

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1547

BRADFORD NATIONAL CLEARING CORPORATION and
BRADFORD SECURITIES PROCESSING SERVICES, INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

NATIONAL SECURITIES CLEARING CORPORATION,

Intervenor.

On Petition for Review of an Order of the
Securities and Exchange Commission

ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE
COMMISSION, RESPONDENT

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United States Court of Appeals
for the District of Columbia Circuit

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I N D E X

	<u>Page</u>
CITATIONS	ii
PRELIMINARY STATEMENT	1
COUNTERSTATEMENT OF THE QUESTION PRESENTED	3
RELATED CASE PENDING BEFORE THIS COURT	4
STATUTES AND REGULATIONS	4
COUNTERSTATEMENT OF THE CASE	4
The Order Under Review In Bradford I	4
The Proposed Rule Changes	8
Proceedings Before the Commission	9
The Order Under Review	10
ARGUMENT	11
THE COMMISSION PROPERLY APPROVED THE TWO PROPOSED RULE CHANGES	11
A. The Standard of Review in This Case—Whether the Commission Abused Its Discretion—and the Statutory Criteria by Which the Commission Evaluated the Pro- posed Rule Changes Are Both the Same as in <u>Bradford I</u> ...	11
B. The Petitioners, in Urging that the Commission Should Have Delayed the Establishment of a National Clearing System Until Petitioner BSPS Develops the Capacity to Participate in Such a System, Are Attempting to Reli- gigate a Matter Which Was Disposed of in the Commission's Earlier Order Granting NSCC Registration and Which Has Been Fully Briefed in This Court in <u>Bradford I</u>	14
C. The Commission Properly Found that the Proposed Rule Changes Were Consistent with Its Order Granting NSCC Registration	21
CONCLUSION	23

TABLE OF CITATIONS

	<u>Page</u>
 <u>Cases:</u>	
*Alabama Power Co. v. Federal Power Commission, 167 U.S. App. D.C. 145, 511 F.2d 383 (1974)	21
American Public Gas Ass'n v. Federal Power Commission, C.A. D.C., No. 76-2000, Slip Op. (June 16, 1977)	12, 13
*Automotive Parts & Accessories Association v. Boyd, 132 U.S. App. D.C. 200, 407 F.2d 330 (1968)	12
Bradford National Clearing Corporation and Bradford Securities Processing Services, Inc. v. Securities and Exchange Commission, No. 77-1199	2, 4
Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947)	21
Shell Oil Co. v. Power Commission, 520 F. 2d 1061 (C.A. 5, 1975) <u>certiorari denied sub nom. California Co. v. Federal Power Commission</u> , 426 U.S. 941 (1976)	13
*Sterling Drug, Inc. v. Federal Trade Commission, 146 U.S. App. D.C. 237, 450 F.2d 698 (1971)	19
T.S.C. Motor Freight Lines, Inc. v. United States, 186 F. Supp. 777 (S.D. Tex. 1960), <u>affirmed sub nom. Herrin Transportation Co. v. United States</u> , 366 U.S. 419 (1961)	21
 <u>Statutes and Rules:</u>	
Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975)	i, 15
Section 31(b), 89 Stat. 170	15
Securities Exchange Act of 1934, 15 U.S.C. 78a, <u>et seq.</u> :	
Section 17A, 15 U.S.C. 78q-1	12, 13, 14
Section 19(a), 15 U.S.C. 78s(a)	12
Section 19(b), 15 U.S.C. 78s(b)	8, 11, 2
Section 19(b)(1), 15 U.S.C. 78s(b)(1)	9
Section 19(b)(2), 15 U.S.C. 78s(b)(2)	1, 13
Section 25(a), 15 U.S.C. 78y(a)	1
Section 25(c)(1), 15 U.S.C. 78y(c)(1)	17
 <u>Rules under the Securities Exchange Act:</u>	
Rule 19b-4, 17 CFR 240.19b-4	8, 9

	<u>Page</u>
<u>Miscellaneous:</u>	
Securities Exchange Act Release No. 13027, 41 Fed. Reg. 53557 (Dec. 7, 1976)	15
Securities Exchange Act Release No. 13308, (February 28, 1977),	9
Securities Exchange Act Release No. 13318, (February 28, 1977),	9
Securities Exchange Act Release No. 13584, 42 Fed. Reg. 13584, (June 1, 1977)	18
Securities Exchange Act Release No. 14252, 42 Fed. Reg. 63830 (Dec. 20, 1977)	15
Securities Exchange Act Release No. 14253 42 Fed. Reg. 63833 (Dec. 20, 1977)	15
Securities Exchange Act Release No. 14411, 43 Fed. Reg. 4295 (Feb. 1, 1978)	13
Securities Exchange Act Release No. 14296, 42 Fed. Reg. 1568 (Jan. 10, 1978)	15
Securities Exchange Act Release No. 14279, 42 Fed. Reg. 63979 (Dec. 21, 1977)	15

* Cases chiefly relied upon.

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v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

NATIONAL SECURITIES CLEARING CORPORATION,

Intervenor.

On Petition for Review of an Order of the
Securities and Exchange Commission

ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE
COMMISSION, RESPONDENT

PRELIMINARY STATEMENT

The petitioners, Bradford National Clearing Corporation ("BNCC"), and Bradford Securities Processing Services, Inc. ("BSPS"), seek review, pursuant to Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a), of an order of the Securities and Exchange Commission (A. 120-125). ^{1/} The Commission's order, entered on April 21, 1977, pursuant to Section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), approved two rule changes of a securities clearing agency, the National Securities Clearing Corporation ("NSCC"), registered with the Commission under the Act.

^{1/} "A. ____" refers to the Appendix filed by the petitioners; "Br. ____" refers to the the petitioners' brief.

The petitioners are the same companies which are seeking review, in No. 77-1199, of a Commission order entered three months earlier (A. 1-36), conditionally granting NSCC's application for registration as a clearing agency. Briefing in No. 77-1199 ("Bradford I") has been completed, and on January 10, 1978, this Court directed that argument in both cases be heard on the same date and before the same panel.

NSCC is a new corporation created to combine the clearing operations that have been performed by three other clearing agencies, which performed clearing operations for transactions effected, respectively, on the New York Stock Exchange, the American Stock Exchange, and in the over-the-counter market. As discussed in our brief in Bradford I, in granting registration to NSCC subject to certain conditions which the Commission imposed, the Commission was carrying out its statutory mandate, enacted in the Securities Acts Amendments of 1975, 2/ to facilitate the prompt establishment of a national system for the clearance and settlement of securities transactions. The two rule changes which are under review in the present case implement the order granting registration and further facilitate the development of a national clearing system.

In their brief in the present case, the petitioners urge essentially two points: that the present Commission order is inconsistent with its earlier order granting registration to NSCC; and that the Commission should delay the establishment of a national clearing system until petitioner BSPS, itself a registered clearing agency, develops the capacity

2/ Pub. L. No. 94-29, 89 Stat. 97 (1975) (the "1975 Amendments").

to participate in such a system, even though other clearing agencies have already developed the requisite capacity.

The petitioners' first point--the claimed inconsistency with the earlier order--is based on a misreading of that order. And the second point--petitioner BSPS's requested delay--is simply an attempt to relitigate a matter which was disposed of in the Commission's earlier order and which has already been briefed in this Court in Bradford I. Furthermore, with respect to petitioner BNCC, it is not apparent why that petitioner is challenging the rule changes, since they should operate to BNCC's benefit by increasing the volume of securities transactions processed by certain clearing agencies for which BNCC performs data processing and related services. Under these circumstances, we submit that the present petition for review is an unwarranted attempt to burden the Commission--as well as NSCC, which has intervened in this proceeding in support of the Commission's order--with frivolous litigation.

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether it was within the scope of the Commission's broad discretion, in the exercise of its quasi-legislative authority to facilitate the establishment of a national clearing system, to approve two rule changes of the National Securities Clearing Corporation ("NSCC"), a registered clearing agency, where the Commission determined that

(a) the two rules would implement the Commission's earlier order granting NSCC registration;

(b) the rules would further the establishment a national clearing system;

(c) the rules would permit broker-dealers to have a wider choice of clearing agencies for the clearance of their securities transactions; and

(d) the rules would enhance competition among clearing agencies.

RELATED CASE PENDING BEFORE THIS COURT

Bradford National Clearing Corporation and Bradford Securities Processing Services, Inc. v. Securities and Exchange Commission, No. 77-1199.

STATUTES AND REGULATIONS

Sections 17A(a) and (b)(1)-(3), 19(b)(1) and (2), and 25a(1)-(4) of the Securities Exchange Act of 1934, 15 U.S.C. 78q-1(a), and (b)(1)-(3), 78s(b)(1) and (2), and 78y(a)(1)-(4) ; Section 31(b) of the Securities Acts Amendments of 1975, 89 Stat. 170; and Rule 19b-4, 17 CFR 240.19b-4, promulgated by the Commission under the Securities Exchange Act, are reprinted in the statutory appendix to the brief of the petitioners. Section 25(c)(1) of the Securities Exchange Act, 15 U.S.C. 78y(c)(1), is quoted at page 17 n. 13, infra.

COUNTERSTATEMENT OF THE CASE

The Order Under Review In Bradford I

In the order under review in Bradford I, entered after more than nine months of proceedings (see the Commission's brief in Bradford I, pages 18-23), the Commission gave extensive and searching consideration both to NSCC's role in furthering the development of a national clearing system and to the competitive implications of NSCC's proposed operations. In granting registration to NSCC, subject to four conditions imposed by the Commission in order to further the establishment of a national

clearing system and to promote competition among broker-dealers and among clearing agencies, the Commission stated (A. 1):

"NSCC's registration, subject to the conditions contained in this order, is an essential step toward the establishment, at an early date, of a comprehensive network of linked clearance and settlement systems and branch facilities with the national scope, efficiencies and safeguards envisioned by Congress in enacting the 1975 Amendments."

NSCC is composed of three divisions, consisting of the three clearing systems which were combined into NSCC. Prior to the registration of NSCC, transactions effected on the New York Stock Exchange ("NYSE") were cleared by the Stock Clearing Corporation ("SCC"), transactions effected on the American Stock Exchange ("Amex") were cleared by the American Stock Exchange Clearing Corporation ("ASECC"), and over-the-counter transactions between members of the National Association of Securities Dealers, Inc. ("NASD"), were largely cleared by the National Clearing Corporation ("NCC"). The clearing operations performed by these companies consisted of the three steps--comparison, clearance and settlement--involved in the processing of securities transactions (see pages 6-10 of the Commission's brief in Bradford I).

~~The order granting registration to NSCC provided that NSCC must operate the SCC, ASECC and NCC clearing systems as three separate divisions, rather than as an integrated system, until the four conditions to its registration are met to the Commission's satisfaction (A. 24-25).~~
The period before the conditions are met, during which NSCC operates through its SCC, ASECC and NCC divisions, is known as "Phase I" (A. 9); when NSCC satisfies the conditions, and the Commission permits it to operate as a single, consolidated entity, "Phase II" will commence (id.).

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The first of the four conditions--the Free Interface Condition--is of particular relevance to the present case, since both of the rule changes here involved implement that condition. The Free Interface Condition (A. 25) requires NSCC to establish full clearing interfaces, or computer links, 3/ with those clearing agencies that operate "continuous netting" clearance systems. 4/ With respect to certain other clearing agencies, which do not operate continuous netting systems, but appear to be capable of establishing some other form of link with NSCC, this condition requires the establishment of "appropriate links" with NSCC. 5/

As a result of these interfaces and links, a brokerage firm, by belonging to only one of the linked clearing agencies, will be able to obtain, through a single agency, clearance and settlement of all of its securities transactions even though they may occur in several different securities markets. The interfaces and links will thus facilitate the development of a national clearing system; and, by eliminating the need for a brokerage firm to belong to a separate clearing agency

3/ A full interface is one that is capable of handling all securities cleared by the linked clearing agencies and capable of handling whatever volume of transactions is submitted by the participants who belong to the clearing agencies.

4/ A continuous netting clearance system nets, or offsets, obligations of participating brokers to deliver securities and funds against the brokers' rights to receive securities and funds, and it also interposes the clearing agency between brokers participating in transactions and permits obligations running between them and the clearing agency to be carried forward and then netted against subsequent obligations (see p. 7 of the Commission's brief in Bradford I).

5/ The Free Interface Condition also prohibits NSCC from charging a fee for the use of an interface.

for each market in which the firm effects securities transactions, the interfaces and links will enable clearing agencies to compete with each other for the clearance and settlement business of brokerage firms.

The Free Interface Condition does not specifically mention BSPS as one of the clearing agencies with which NSCC must establish an interface or link prior to the commencement of Phase II operations because BSPS, although a registered clearing agency, performs only the settlement function of the three-step clearing process, and does not perform the comparison or clearance steps (through a continuous netting system or otherwise) (see pages 9, 35-36, 56 of the Commission's brief in Bradford I). Nevertheless, the Commission expressly stated in the order granting registration that clearing agencies must permit interfaces with other registered clearing agencies which develop the capability to establish interfaces (A. 19, 33 n. 168). Accordingly, BSPS will be able to obtain interfaces with the other clearing agencies when it develops the requisite capacity.

The clearing agencies named in the Free Interface Condition as the ones with which NSCC must establish full interfaces prior to the commencement of Phase II operations are Midwest Clearing Corporation ("MCC"), Pacific Clearing Corporation ("PCC") and Securities Clearing Corporation of Philadelphia ("SCCP"). These "regional" clearing agencies, each of which is affiliated with a regional securities exchange, have continuous netting clearance systems. Along with SCC, and (to the extent its operations have been combined with SCC) ASECC, these regional clearing agencies are participants in a limited interface program, called the Regional Interface Operation ("RIO"), which was begun in 1975 (see page 32 n. 54 of the Commission's brief in Bradford I).

The Proposed Rule Changes

The two proposed rule changes here involved were submitted to the Commission by NSCC on February 22, 1977, pursuant to Section 19(b) of the Act, 15 U.S.C. 78s(b), and Rule 19b-4 thereunder, 17 CFR 240.19b-4, which require clearing agencies to submit proposed changes in their rules to the Commission for approval.

Both rule changes implement the Free Interface Condition to NSCC's registration. The first of the two rule changes, the "Bond Rule" (A. 37-46), expands the RIO interfaces by increasing the number of securities which may be cleared through those interfaces. Specifically, it transfers from the ASECC Division of NSCC, which does not have interfaces with the regional clearing agencies, to the SCC Division, which does have such interfaces, the clearance of transactions in bonds listed on the Amex. 6/ As a result, brokerage firms, which have not been able to clear their transactions in Amex-listed bonds through clearing agencies other than the ASECC Division of NSCC, will now be able to use the interfaces to clear those transactions through other clearing agencies and to net the transactions against the firms' other securities transactions. 7/

The second proposed rule change, the "Special Representative Rule" (A. 47-68), implements the Free Interface Condition by increasing the

6/ Transactions in Amex-listed equity securities were already being cleared through the SCC Division.

7/ In submitting this rule change, NSCC stated that the Bond Rule would aid

"the removal of impediments to and perfection of the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions by permitting the expansion of NSCC interfaces with MCC, PCC and SCCP" (A. 40).

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number of transactions which may be cleared through the RIO interfaces and by eliminating the need, under certain circumstances, for a brokerage firm to belong to NSCC in order to obtain clearance of transactions effected on the NYSE and the Amex. Without the Special Representative Rule, transactions executed on the NYSE or the Amex by a brokerage firm acting on behalf of another brokerage firm or on behalf of an institutional customer (such as a bank or insurance company) would be submitted to NSCC for clearance in the name of the executing broker rather than in the name of the principal brokerage firm or institution, even though the principal firm or institution was a member of NSCC or of a clearing agency interfaced with NSCC. As a result, these transactions could not be netted against the principal firm's or institution's other securities transactions. The Special Representative Rule permits the executing broker, acting as "Special Representative" for the principal firm or institution, to submit the transactions to NSCC in the name of that firm or institution, thereby permitting the transactions to be netted against the firm's or institution's other transactions. In addition, the principal firm or institution, if it is a member of a clearing agency which is interfaced with NSCC, may, in this fashion, clear its NYSE and Amex transactions through the interfaced clearing agency without also having to be a member of NSCC.

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Proceedings Before the Commission

The Commission gave public notice of NSCC's proposed rule changes, pursuant to Section 19(b)(1) of the Act and Rule 19b-4 thereunder, and provided a four-week period for interested persons to submit written comments on the proposed rule changes. 8/ The Commission received

8/ Securities Exchange Act release Nos. 13308 and 13318 (Feb. 28, 1977) (A. 72, 77).

three comment letters--all opposing the proposed rule changes--during that period, from petitioners BSPS and BNCC and from the TAD Depository Corporation, an affiliate of the petitioners (A. 91- 9). BSPS submitted a second letter to the Commission, after the expiration of the comment period (A. 100-103).

On April 21, 1977, the Commission considered the proposed rule changes in a public meeting (A. 106-119). The Commission directed its attention particularly to the question of whether the rule changes would enhance NSCC's competitive position at the expense of other clearing agencies and carefully considered the petitioners' written submissions during its meeting.

The Order Under Review

The Commission issued its Order Approving Rule Changes Submitted by the National Securities Clearing Corporation--the order under review--on April 21, 1977 (A. 120-125). The Commission determined in its order (A. 125) that the rule changes were

✓ "consistent with the order granting NSCC registration as a clearing agency and with the requirements of the Act and rules and regulations thereunder applicable to registered clearing agencies."

In explaining this conclusion, the Commission discussed the significant aspects of the comments that had been submitted, particularly those directed at the competitive effects of the rule changes. The Commission determined that, contrary to the petitioners' assertion that the rule changes embodied an attempt by NSCC to evade the Free Interface Condition, "both rule changes are designed to implement 'The Free Interface Condition'" to the order granting NSCC's registration (A. 122).

In this regard, the Commission emphasized that the Bond Rule would "add transactions * * * [that] may be cleared through clearing agencies participating in the SCC Division's RIO interfaces" (A. 122). And the Commission determined that the Special Representative Rule would also further the establishment of full interfaces between NSCC and the interfaced regional clearing agencies by enabling members of the regional clearing agencies who do not belong to NSCC to clear and settle their Amex and NYSE trades through their own clearing agencies (*id.*). The Commission stated that the changes thus gave brokerage firms, which previously had to clear and settle their trades through NSCC, "a wider choice in clearance and settlement," thereby enhancing "[i]nstead of restricting competition between clearing agencies" (A. 122).

ARGUMENT

THE COMMISSION PROPERLY APPROVED THE TWO PROPOSED RULE CHANGES.

A. The Standard of Review in This Case--Whether the Commission Abused Its Discretion--and the Statutory Criteria by Which the Commission Evaluated the Proposed Rule Changes Are Both the Same as in Bradford I.

1. The order under review was issued pursuant to Section 19(b) of the Securities Exchange Act, which contemplates that the Commission conduct informal notice-and-comment proceedings to approve or disapprove proposed rule changes of the self-regulatory organizations registered with it--that it give public notice of the proposed rule changes and afford interested persons the opportunity to submit written comments.

The standard of review to be applied by this Court, in this proceeding to review the Commission's approval of NSCC's proposed rule changes, is the same as that to be applied by this Court in reviewing the Commission's earlier order granting NSCC registration. Although

the Commission's order granting NSCC registration was issued pursuant to Section 19(a) of the Act, both Section 19(a) and Section 19(b), pursuant to which the order approving the rule changes was issued, contemplate that the Commission conduct informal proceedings (see pages 42-48 of the Commission's brief in Bradford I).

As we noted in our brief in Bradford I, Congress, in directing the Commission to facilitate the establishment of a national clearing system, gave the Commission broad quasi-legislative discretion to shape a system to carry out the statutory objectives in Section 17A of the Act, 15 U.S.C. 78q-1, relating to the national clearing system. The registration of NSCC was a major step in the establishment of the national clearing system; and the proposed rule changes involved here are further steps in the development of that system. When, as here, an agency like the Commission acts pursuant to a grant of quasi-legislative power, the reviewing court's function is limited to a determination that the agency has not abused its broad discretion. The court's function is

"to see only that the result is reasonable and within the range of authority conveyed, that it has been formulated in the manner prescribed, and that the disappointed have had the opportunity provided by Congress to make their views prevail."

Automotive Parts & Accessories Association v. Boyd, 132 U.S. App. D.C. 200, 213, 407 F.2d 330, 343 (1968).

Moreover, where, as here, "regulation features novelty, in subject, technique or both, the [court's] narrow scope of review is further circumscribed." American Public Gas Ass'n v. Federal Power Commission, C.A. D.C., No. 76-2000, Slip Op. at 23 (June 16, 1977). And, "extra deference is provided" where the Commission has stated an intention to exercise,

and is exercising, ongoing oversight and evaluation of its decision. Id. at 24; see also Shell Oil Co. v. Federal Power Commission, 520 F.2d 1061, 1070-1077 (C.A. 5, 1975), certiorari denied sub nom., California Co. v. Federal Power Commission, 426 U.S. 941 (1976). 9/

2. Not only is the standard of judicial review the same here as in Bradford I, but the criteria by which the Commission evaluated the rule changes in the present case are the same criteria followed by the Commission in considering NSCC's application for registration involved in Bradford I. Section 19(b)(2) of the Act, pursuant to which the Commission approved the two rule changes, provides:

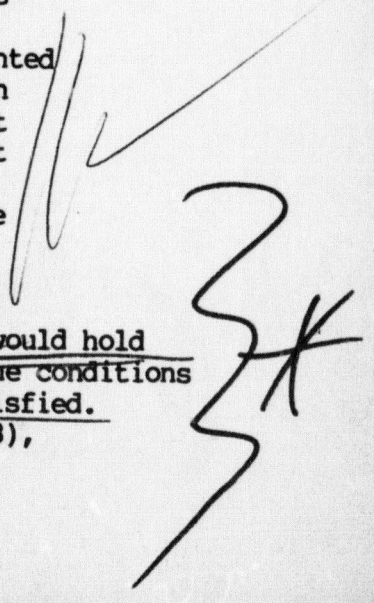
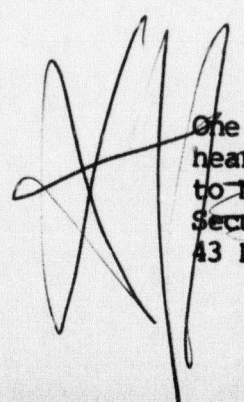
"The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act."

In accordance with the directive of Section 19(b)(2), and just as the Commission had done in considering NSCC's application for registration, the Commission evaluated the rule changes in light of the requirements of Section 17A of the Act relating to the rules of clearing agencies,

9/ The Commission's order granting registration stated (A. 23):

"In addition to the Commission's continuing jurisdiction under the Act and oversight of NSCC as a registered clearing agency, the registration granted by this order is conditional and may be withdrawn if the conditions contained in this order are not satisfied or if it appears to the Commission that delays in satisfying the conditions warrant the exploration of other approaches to facilitate the prompt establishment of a national clearing and settlement system."

On February 1, 1978, the Commission announced that it would hold hearings beginning on March 7, 1978, to ascertain why the conditions to NSCC's registration have not, as yet, been fully satisfied. Securities Exchange Act Release No. 14411 (Jan. 25, 1978), 43 Fed. Reg. 4295 (Feb. 1, 1978).



and in light of the objectives of the national clearing system and other policy considerations contained in Section 17A, including the maintenance of fair competition among broker-dealers and among clearing agencies.

The petitioners, in setting forth what they claim to be the proper weight to be given to competitive considerations, erroneously rely (Br. 14-15), as they did in their brief in Bradford I (at page 17), on portions of the legislative history of the 1975 Amendments that pertain solely to the national market system. The Commission's brief in Bradford I (at pages 48-54) fully articulated the correct standards, as set forth in Section 17A of the Act and as discussed in the legislative history relating to the national clearing system, by which it must evaluate the rules of a registered clearing agency. Although the Commission, in its order under review in Bradford I, was determining whether to grant NSCC's application for registration, the criteria by which it evaluated that application--including the proper weight to be given to competitive factors--are the same criteria to be applied in reviewing the rule changes involved here.

B. The Petitioners, in Urging that the Commission Should Have Delayed the Establishment of a National Clearing System Until Petitioner BSPS Develops the Capacity to Participate in Such a System, Are Attempting to Relitigate a Matter Which Was Disposed of in the Commission's Earlier Order Granting NSCC Registration and Which Has Been Fully Briefed in This Court in Bradford I.

The petitioners argue (Br. 22) that the rule changes, "when combined with the established business practices resulting from the tying rules of the NYSE and Amex together with the trading dominance of the NYSE and Amex[,] allow NSCC to offer services no other clearing agency can offer and limit the ability of other clearing agencies to compete directly

with NSCC." This statement is simply untrue. Each clearing agency that has established an interface with NSCC can offer these new services to its members, just as it has been, and is now, offering other services as a result of the existing interfaces. Indeed, in submitting the proposed rule changes to the Commission for approval, NSCC pointed out that the purpose of the rules was to permit greater use of the interfaces by the interfaced clearing agencies (A. 43-44, 54).

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The "tying rules" to which the petitioners refer require, among other things, that brokers submit trade data to the clearing agency affiliated with the exchange where the transactions occurred (unless both the buyer and seller agree to use another clearing agency). The tying rules are contrary to the requirements of the Act, as amended in 1975, and are in the process of being eliminated pursuant to Section 31(b) of the 1975 Amendments. ^{10/} In any event, the tying rules have not precluded the clearance and settlement of transactions through the existing interfaces, and thus have not prevented the clearing agencies interfaced with NSCC from clearing and settling transactions effected on the NYSE and the Amex.

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With the addition of Amex bonds to the list of securities that can be cleared through the interfaces (as a result of the Bond Rule), clearing agencies interfaced with NSCC can now clear and settle all

^{10/} 89 Stat. 170. The Commission instituted proceedings pursuant to Section 31(b) on December 1, 1976. Securities Exchange Act Release No. 13027, 41 Fed. Reg. 53557 (Dec. 7, 1976). As a result of these proceedings, the NASD has submitted rule changes eliminating its tying rules, see Securities Exchange Act Release Nos. 14252 and 14253 (Dec. 12, 1977), 42 Fed. Reg. 63830, 63833 (Dec. 20, 1977), as have both the NYSE and the Amex. See Securities Exchange Act Release No. 14296 (Dec. 21, 1977), 43 Fed. Reg. 1568 (Jan. 10, 1978) (Amex); Securities Exchange Act Release No. 14279 (Dec. 15, 1977), 42 Fed. Reg. 63979 (Dec. 21, 1977) (NYSE).

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transactions that occur on the Amex and NYSE and will be able to compete with NSCC for clearance of Amex and NYSE trades.

The Special Representative Rule, like the Bond Rule, enables clearing agencies interfaced with NSCC to compete with NSCC for clearance of NYSE and Amex trades. This rule permits brokerage firms and financial institutions which are members of clearing agencies interfaced with NSCC to have their NYSE and Amex trades cleared by their clearing agencies through the interfaces, and it permits them to do so without having to be a member of NSCC. 11/

Thus, BSPS's real complaint is not that no clearing agency will be able to offer services which NSCC will be able to offer, but rather that the rule changes will not benefit petitioner BSPS. 12/ But, any inability of BSPS to offer these services at the present time is, as the petitioners themselves recognize (Br. 26, 30, 32, 33, 56), the result of BSPS's present incapacity to interface with NSCC or any other clearing agency. 13/

11/ The petitioners' assertion (Br. 51) that the Special Representative Rule will eliminate the comparison step of the clearing process is incorrect. The Special Representative Rule relates to the clearing and settlement of trades that have been compared, and will not affect, in any way, the comparison process currently performed by clearing agencies (see A. 53, 54).

12/ The other petitioner, BNCC, claims (Br. 7-8) that PCC, for which it performs data processing, will lose clearing volume as a result of the Special Representative Rule and that BNCC will, in turn, lose income. The Special Representative Rule, however, should not result in a reduction of PCC's clearing volume. Rather, if its members use a special representative to submit their NYSE and Amex trades, so that, for the first time, all these trades can be cleared through PCC, PCC's volume and, therefore, BNCC's income, should increase.

13/ The petitioners imply (Br. 33, 35, 56) that the reason BSPS has not developed the capacity to interface is that the tying rules of the exchanges have precluded it from competing for the clearing business which would justify developing such a capacity. But,

Nevertheless, the petitioners, in their comments submitted to the Commission in connection with the proposed rule changes, (A. 91-104) stated essentially the same argument which they had made, and which the Commission had rejected, in connection with NSCC's application for registration: that steps toward the development of the national clearing system, such as these rule changes, should be delayed until BPS finally invests in a continuous netting system and is able to interface with other clearing agencies.

In granting registration to NSCC, the Commission properly determined that the establishment of the national clearing system could be achieved most expeditiously by developing full interfaces among the clearing agencies which had already established the limited RIO interfaces. In so doing, the Commission chose the best available plan—one which it believed would foster competition among broker-dealers, and, for the first time, would permit clearing agencies to compete for the clearance and settlement of transactions occurring in all markets. When the Commission directed NSCC to establish full interfaces with other clearing agencies,

13/ (footnote continued)

~~this argument was not presented to the Commission for its consideration in connection with the rule changes or in connection with NSCC's application for registration, and accordingly the petitioners are precluded from urging it before this Court by Section 25(c)(1) of the Act, 15 U.S.C. 78y(c)(1), which provides:~~

"No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so."

In any event, BPS has not demonstrated that its failure to develop a capacity to interface was other than voluntary.

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it knew that BSPS did not have the capacity to participate. 14/ Nevertheless, the Commission concluded that the benefits to broker-dealers and other clearing agencies outweighed BSPS's demand that Phase II be delayed until BSPS invests in a continuous netting system and is able to interface with NSCC. The Commission stated (A. 1):

"NSCC registration, subject to the conditions contained in this order, is an essential step toward the establishment, at an early date, of a comprehensive network of linked clearance and settlement systems and branch facilities with the national scope, efficiencies and safeguards envisioned by Congress in enacting the 1975 Amendments".

The petitioners claim (Br. 48) that the Commission's analysis of the proposed rule changes was deficient because, according to the petitioners, the Commission

"did not identify or appreciate the significant burdens on competition imposed by the proposed rule changes, did not evaluate the benefits to be achieved by these rules, and thus was unable, indeed made no attempt, to strike a proper [sic] balance between such competitive burdens and their necessity or appropriateness for the achievement of purposes of the Act."

14/ This is not to say that BSPS has been foreclosed from participating in the national clearing system. As noted supra page 7, the Commission's order granting NSCC registration expressly recognized the right of any clearing agency, possessing the necessary capability, to interface with NSCC.

And the Commission repeated its position in Securities Exchange Act Release No. 13584 (June 1, 1977), 42 Fed. Reg. 13584, announcing proposed permanent registration standards for clearing agencies:

"[T]he Commission believes that, unlike other categories of statutory participants, registered clearing agencies should be permitted to participate in or interface with other registered clearing agencies without complying with all the host clearing agencies' conditions and without paying the same fees as other participants for services necessary to facilitate participation or establish interfaces * * *."

In asserting that the Commission thus failed to evaluate the competitive and other benefits and disadvantages of the rule changes, the petitioners claim (Br. 57) that the Commission, instead, "puts forth," as the "sole basis * * * to justify approval of the NSCC rule changes," the "unsupported assertion that 'everything can't be done at once.'"

The petitioners have completely distorted the nature and basis of the Commission's determination. The order approving the rule changes was not, as the petitioners assert, based on the proposition that "everything can't be done at once." Those words appear in remarks made by a member of the Commission's staff during the Commission's open meeting prior to the Commission's approval of the rule changes and issuance of its order (A. 107). But, even assuming, as the petitioners suggest (Br. 36, 38), that those remarks were concurred in by one of the Commissioners, views expressed by a Commissioner at a Commission meeting do not necessarily represent the basis relied upon by that Commissioner in his ultimate vote on the matter involved.

More importantly, however, the views of an individual Commissioner do not ~~constitute the position of the Commission as a body.~~ As this Court stated in Sterling Drug, Inc. v. Federal Trade Commission, 146 U.S. App. D.C. 237, 450 F.2d 698, 706 (1971), in an analogous situation, memoranda prepared by individual Commissioners—unless adopted by the whole Commission—do not represent that body's decision. The sound rationale of that case is that such comments "provide only the individual's reasons * * * not the reasons of the Commission as a whole * * * and do not necessarily contain a full and accurate account of the grounds for the decision" (450 F.2d at 709). Only the statements given by the Commission itself can properly be used to ascertain the basis of the Commission's determination.

The basis of the Commission's determination here to approve the proposed rule changes is set forth in the order under review; and, contrary to the petitioners' assertion that the Commission did not evaluate the competitive and other benefits and disadvantages of the rules, the Commission's order considered whether the rules were consistent with the requirements of Section 17A of the Act and would further the prompt achievement of the national clearing system, the extent to which broker-dealers would benefit, and the prospect of enhancing the ability of clearing agencies to compete with NSCC (A. 120-125). The Commission also carefully considered the comments of the petitioners; indeed, their comments were the focus of the Commission's order.

In responding to the petitioners' comments, the Commission, noting the claimed anti-competitive effects of the rules (A. 122-123), determined to approve the rules in light of its conclusions (A. 122) that they would (1) further the implementation of the Free Interface Condition of the order granting NSCC registration, (2) permit brokers to have a "wider choice" of clearing agencies for clearance of NYSE and Amex trades, and (3) enhance, instead of restrict, competition among clearing agencies. With respect to the petitioners' complaint that the tying rules would prevent clearing agencies other than NSCC from deriving any benefit from the rule changes, the Commission stated (A. 123):

"By facilitating the use of alternative clearing and settlement arrangements, we believe the proposed changes would, in effect, break the link between NYSE and Amex trading and SCC and ASECC Division clearing and settlement which has historically existed."

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While it is axiomatic that a rational basis for the Commission's determination must be articulated within its order, 15/ the Commission was not obligated to reiterate in detail its reasons—enunciated only three months earlier—for its determination not to delay the establishment of the national clearing system to await the entry of BSPS. See Alabama Power Co. v. Federal Power Commission, 167 U.S. App. D.C. 145, 511 F.2d 383 (1974). Because the Commission had already considered BSPS' contention in connection with its order granting NSCC registration, it did not have to discuss it a second time. 16/

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C. The Commission Properly Found that the Proposed Rule Changes Were Consistent with Its Order Granting NSCC Registration.

The petitioners assert (Br. 54-55) that the Commission's order approving the rule changes "allowed NSCC to offer new services and to integrate certain other[s] prior to satisfaction of the conditions" and is therefore inconsistent with its order granting NSCC registration, which the petitioners read (Br. 40) as "requir[ing] the transition from Phase I to [the integrated operations of] Phase II to occur 'all at

15/ See, e.g., Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 196-197 (1947).

16/ See T.S.C. Motor Freight Lines, Inc. v. United States, 186 F. Supp. 777, 787 (S.D. Tex. 1960), affirmed sub nom. Herrin Transportation Co. v. United States, 366 U.S. 419 (1961), in which the court stated:

"The Administrative Procedure Act does not require that detailed findings with supporting reasons previously made and adhered to by the Commission be reiterated after each attack. The statement by the Commission that the 'findings of the Commission [are] in accordance with the evidence and the applicable law' is obviously a statement that the Commission is standing behind the original detailed and articulate findings and conclusions. The law requires no more."

once.'" Their assertion, however, is based on a misreading of the order granting NSCC registration.

Not inconsistent with order
Phase II happens all at once. But 4 conditions must be met (not 2) before Phase 2 rules implement interface condn
The petitioners appear to confuse the commencement of Phase II with the implementation of the four conditions which must be satisfied prior to the commencement of Phase II. The two rule changes involved here serve to implement one of the conditions, the Free Interface Condition; and the order granting registration does not provide that this condition, or any of the other three conditions, must, in the petitioners' words, be implemented "all at once." Indeed, since the order provides (A. 25, emphasis added) that Phase II shall not commence "unless NSCC shall have first" satisfied the conditions, and since the implementation of the conditions was viewed by the Commission as having the beneficial effect of enhancing competition among broker-dealers and among clearing agencies, the order clearly does not contemplate that steps implementing the conditions must be delayed until other implementing steps can be taken.

Moreover, the Commission's purpose, in prohibiting NSCC from operating as an integrated entity prior to its satisfaction of the four conditions to its registration, was to prevent NSCC from being able to offer services which no other clearing agency could offer. As we have seen, however (pages 14-16, supra), the rule changes here involved do not give NSCC that advantage. Indeed, they are specifically designed to enable the clearing agencies which are interfaced with NSCC to expand the clearing services which can be offered by them.

CONCLUSION

For the foregoing reasons, the Commission's order approving the rule changes should be affirmed.

Respectfully submitted,

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